COPY

92-1342

No._____

FILE
FEB 8 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROBERT PAUL WILSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE H. WILLIAMSON, Chief
Assistant Attorney General
ROBERT R. ANDERSON, Senior
Assistant Attorney General
HARRY JOSEPH COLOMBO*
Deputy Attorney General
1515 K Street, 3rd Floor
Sacramento, California 95814
Telephone: (916) 324-5170
ATTORNEYS FOR PETITIONER

*Counsel of Record

123 pp

QUESTIONS PRESENTED

1. Whether the exclusionary rule set forth in Massiah v. United States 377 U.S. 201 (1964) and its progeny, particularly the majority opinion in Maine v. Moulton 474 U.S. 159 (1985), falls within the protection contemplated by the drafters of the Sixth Amendment right to counsel.

2. Whether the failure to make a Massiah/Moulton objection to evidence that respondent, while in custody pending trial for murder punishable by death and represented by counsel, solicited a district attorney's investigator to murder a prosecution witness constitutes ineffective assistance of counsel within the meaning of Strickland v. Washington 466 U.S. 668 (1984).

TABLE OF CONTENTS

		Page
OPINIONS BELOW		1
JURISDICTION		2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED		3
STATEMENT OF THE CASE		3
STATEMENT OF FACTS		6
REASONS FOR ALLOWANCE OF THE WRIT		16
SUMMARY OF ARGUMENT		21
ARGUMENT		
I	THE EXCLUSIONARY RULE SET FORTH IN Massiah v. United States 377 U.S. 201 (1964) AND Maine v. Moulton 474 U.S. 159 (1985), DOES NOT FALL WITHIN THE PROTECTION CONTEMPLATED BY THE DRAFTERS OF THE SIXTH AMENDMENT RIGHT TO COUNSEL.	25
II	RESPONDENT'S STATE TRIAL COUNSEL'S FAILURE TO MAKE A Massiah/Moulton OBJECTION DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL WITHIN THE MEANING OF Strickland v. Washington, 466 U.S. 668 (1984)	38
CONCLUSION		42

TABLE OF AUTHORITIES

Cases	Page
Gideon v. Wainwright, 372 U.S. 335 (1963)	25
Johnson v. Zerbst, 304 U.S. 458 (1938)	25
Maine v. Moulton, 474 U.S. 159 (1985)	16, 21, 26
Massiah v. United States, 377 U.S. 201 (1964)	16, 21, 26
Strickland v. Washington, 466 U.S. 668 (1984)	17, 39
United States v. Gouveia, 467 U.S. 180 (1984)	34

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROBERT PAUL WILSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the California Supreme Court filed on November 12, 1992, in No. S006546, a published opinion at 3 Cal.4th 926, 13 Cal.Rptr.2d 259, 838 P.2d 1212, is attached hereto as Appendix A.

The opinion of the California Supreme Court, also filed on November 12, 1992, in No. S027645, also a published opinion at 3 Cal.4th 945, 13 Cal.Rptr.2d 269, 838 P.2d

1222, is attached hereto as Appendix B.

On December 16, 1992, the California Supreme Court issued the remittitur in No. S006546 which is attached as Appendix C.

On January 11, 1993, the California Supreme Court issued an order articulating its reasons[1/] for filing the decision in No. S006546 on November 12, 1992, which is attached as Appendix D.

JURISDICTION

The date of the judgment which petitioner seeks to have reviewed is November 12, 1992.

A motion to recall the remittitur was denied on January 11, 1993.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1257(a).

---

1. Petitioner believes that this order was in response to petitioner's motion to recall the remittitur and is a de facto denial of petitioner's motion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

On June 1, 1988, respondent, who shot his employer in the head twice while the victim was sleeping and stole the victim's wallet, was convicted by jury in a state court in California of murder in the first degree, a violation of California Penal Code section 187 and robbery, a violation of California Penal Code section 211. The state jury also found true a special allegation that in the commission of these offenses respondent personally used a firearm, which use was not necessarily an element of the offenses, within the meaning of California Penal Code section

12022.5. The state jury further found true a "special circumstance" allegation that the murder was committed during a robbery, within the meaning of California Penal Code section 190.2, subdivision (a)(17).

On June 9, 1988, the state jury set the punishment for respondent at death.

On July 14, 1988, respondent's motion for modification of the verdict was denied by the state trial court. Respondent was then sentenced to death. Respondent's appeal of this judgment and sentence to the California Supreme Court was automatic pursuant to California Penal Code section 1239, subdivision (b).

On or about July 14, 1992, respondent filed a petition for writ of habeas corpus.

On November 12, 1992, the California Supreme Court granted respondent's petition for writ of habeas corpus ruling

that respondent's state trial counsel had provided ineffective assistance by failing to raise an objection based on Massiah v. United States 377 U.S. 201 (1964) and Maine v. Moulton 474 U.S. 159 (1985) to the introduction of evidence that respondent, while in custody pending trial for murder punishable by death and represented by counsel, solicited a district attorney's investigator to murder a prosecution witness. The California Supreme Court remanded respondent to the state trial court and dismissed as moot his appeal.

On January 11, 1993, petitioner's motion to recall the remittitur was denied by the California Supreme Court.

STATEMENT OF FACTS

Guilt Phase Presentation

Roy Swader sold tools at a flea market in Tucson, Arizona. (RT 821, 828.)[2/] He would often carry large amounts of cash in a trucker's wallet.[3/] (RT 823-824.) Mr. Swader came to California to buy the tools he sold at the flea market in Arizona. (RT 828-829, 841.) Ordinarily, he would leave on a Monday to go buy tools and return the next day. (RT 829.)

Respondent worked for, and for awhile lived with, Mr. Swader. (RT 829-830, 842, 849-850.) At one point, respondent made mention of the fact that Mr. Swader had a large amount of cash on his person. Respondent said he "was tempted to knock

---

2. The reporter's transcript on appeal is hereinafter designated as "RT" with pertinent page citations immediately following.

3. This is a large wallet with an attached chain that can be affixed to a belt. (RT 823, 839.)

Roy off and take the money because he could live good on four fucking thousand dollars." (RT 855.)

In early September 1984, Mr. Swader bought a handgun at the swap meet and brought it home. (RT 834, 842.)

On Tuesday morning, September 4, 1984, Mr. Swader loaded his trailer and van to drive to California. (RT 831-832.) That night, Mr. Swader drove into the Shell station at 43411 Monroe Avenue near Interstate 10 in Indio, California. Mr. Swader bought gas at the station. Mr. Swader had a large black wallet with a chain on it that he got his money from. (RT 871.) The attendant at the station recognized Mr. Swader from previous visits to the station. (RT 867-869.) Respondent came into the station store and bought a Pepsi. (RT 870, 875, 894-897.) The attendant gave Mr. Swader a receipt for the gas purchase. (RT 872.)

On September 5, 1984, approximately noon, the body of Roy Swader was discovered in his van in a parking lot of Martin Luther King Park in Long Beach. (RT 861-862.) Mr. Swader had two gunshot wounds in his head. His belt was undone, and he did not have a wallet in his pants. (RT 882-883.) The gas receipt from the Indio Shell station was in Mr. Swader's shirt pocket. (RT 883.) A black T-shirt and a pair of jeans were recovered from the van. (RT 884-885.)

The T-shirt was identified as one that respondent often wore. (RT 835, 846-847, 856.) The jeans were too small for Mr. Swader to have worn. (RT 885.)

Mr. Swader was five feet ten inches tall and weighed 215 pounds. (RT 959.) Two slugs, apparently .38-caliber, were recovered from the head of Mr. Swader by the pathologist. (RT 888-889.)

Long Beach police officers went to

Tucson, Arizona, to try to find respondent. They found the residence of Wayne Anderson and Sonia Craven had been abandoned. (RT 890, 898-899.) The landlord gave the officers permission to look around inside the residence. They found paperwork from Kansas in respondent's name in the residence. (RT 891.)

A latent impression of respondent's left middle finger was obtained from the inside portion of the driver's side door just below the window of Mr. Swader's van. (RT 989, 994-996.)

Farrell Torregano, an admitted convicted felon[4/], met respondent in the Los Angeles County Jail in April 1987. (RT 974.) Mr. Torregano and respondent met daily during recreation time in the jail. (RT 975.) Over the course of several months, respondent told Mr. Torregano that he (respondent) had been working for a guy in Tucson at swap meets. Respondent and his boss would come to California to buy tools. (RT 976, 980.) Respondent said that he had asked for a loan because he "really needed the money." Respondent did not tell Mr. Torregano what he needed the money for. Respondent's boss would not lend him the money. Then, in Martin Luther King Park in Long Beach, respondent shot his boss in the head two times as he slept. (RT 976-978.)

---

4. Mr. Torregano acknowledged having been convicted of grand theft person and joyriding. (RT 980-981.)

Respondent took the gun and money and fled. (RT 978-979.)

Donald Loar, also known as David Grundy, shared a cell in the Los Angeles County Jail with respondent in October 1987. (RT 908-909.) Mr. Loar, also an admitted convicted felon[5/], had met respondent while attending church in the jail. (RT 909.) Respondent and Mr. Loar discussed their respective pending cases. (RT 911-912.) Respondent told Mr. Loar that he "shouldn't have left the gas receipt in the van," and "there was a witness that was a thorn in his side that could do him a lot of harm if he testified." (RT 912-913.)

Respondent asked Mr. Loar to contact a "hit man" to eliminate the problem

---

5. Mr. Loar acknowledged that he had been convicted of possession for sale of heroin and "fraud." (RT 904-905.) He was in custody as the result of a violation of probation in the "fraud" case. (RT 903-904.)

witness. (RT 912, 914.) Mr. Loar contacted the district attorney's office and told investigator Frank Kovacevich what respondent had said. Mr. Kovacevich then had Mr. Loar arrange a phone call with respondent wherein Mr. Kovacevich would portray a "hit man." (RT 914.)

Mr. Loar made two phone calls to Mr. Kovacevich in the company of respondent. Each time, after Mr. Kovacevich answered, Mr. Loar gave the phone over to respondent. (RT 918-921.) The first phone call was made on October 29, 1987. (RT 943.)

In the first phone call, respondent told Mr. Kovacevich that there is an off-ramp to Monroe Street from Interstate 10 in Indio and that there is a Shell station on Monroe Street. Respondent said that the afternoon attendant, possibly a "Richard Bernie," came on duty about 2:00

p.m.. (SCT 3-4.)[6/] Respondent described the attendant as being in his mid-thirties with blondish-red hair and weighing between 180 and 200 pounds. (SCT 5.) Mr. Kovacevich asked respondent, "what do you want done with this guy?" Respondent responded, ". . . I'm kind of in a tight scrape and this -- this crazy thing is going on with -- it's -- he's going to end up walkin' in here and spitting out a bunch of lies which could put me in one hell of a whole lot of trouble." Respondent suggests that "it would be most helpful if he wasn't [at the trial]." (SCT 6.) Mr. Kovacevich asked respondent if he wanted the attendant scared. Respondent said, ". . . I think it's gonna come out a little bit more drastic than that. I think it'd be better if he just

---

6. Transcripts of the tape-recorded phone conversations are included in the supplemental clerk's transcript.

kind of took a permanent vacation." (SCT 8.)

The second phone call was made on November 3, 1987. (RT 943.) In this phone call, Mr. Kovacevich clarified with respondent the name of the attendant at the gas station that was to be assassinated. (SCT 27-32.)

Respondent presented no evidence at this phase of the trial. (RT 1011.)

Penalty Phase Presentation

It was stipulated that respondent had been convicted on December 2, 1983, of felony theft in Kansas. (RT 1145.)

Defense

On June 13, 1986, respondent provided information to Detective John Thomas of the Pasadena Police Department in regards to a murder case. (RT 1155.) Respondent was subpoenaed to testify at the preliminary hearing of the case, but was not called as a witness. (RT 1154.)

Jeff Jonas, a supervising deputy district attorney in Los Angeles, used respondent as a rebuttal witness in a murder trial he prosecuted in 1987.[7] (RT 1146-1149.)

Pastor Lynn Schubert described respondent as a regular attendee of services conducted in the Hall of Justice jail. (RT 1157-1160.)

Deanna Owen had known respondent as of the time of trial for over nine years. (RT 1169.) She described respondent as a non-violent person and a "good friend." (RT 1172.)

Cindy Wilson, respondent's wife, claimed he "has not got a violent bone in his body." (RT 1178.)

Brad Fisher, a clinical forensic psychologist, opined that respondent

---

7. Apparently this was not the same murder case that Detective Thomas had worked on involving appellant.

suffered from minimal brain dysfunction. (RT 1204.) Dr. Fisher further opined that it would be "out of character" for respondent to have committed murder. (RT 1209.)

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner urges that a writ of certiorari should be granted for the following special and important reasons:

1. The California Supreme Court granted respondent's petition for writ of habeas corpus, thus voiding respondent's murder and robbery convictions and his sentence of death, in large measure because of the interpretation of the protection afforded criminal defendants by the Sixth Amendment right to counsel as set forth in the majority opinions in Massiah v. United States 377 U.S. 201 (1964) and Maine v. Moulton 474 U.S. 159 (1985).

The California Supreme Court was constrained to hold, based on the majority opinions in Massiah and Moulton, that evidence that respondent, while in custody awaiting trial for murder, had solicited a district attorney's investigator to murder a prosecution witness should have been objected to by respondent's state trial counsel and excluded as evidence of consciousness of guilt in the capital murder trial. Thus, the failure of respondent's state trial counsel to raise an objection to the murder solicitation evidence was deemed by the California Supreme Court to constitute incompetence within the meaning of Strickland v. Washington 466 U.S. 668, 687 (1984).

Petitioner submits that the decision rendered by the California Supreme Court, albeit in harmony with the majority opinions in Massiah and Moulton, results in a substantial injustice because

respondent's murder conviction and death sentence have been voided, thus compelling the People of the State of California to present anew the evidence of respondent's guilt.

Petitioner further submits that Massiah and its progeny, particularly Moulton, should now be revisited.

Petitioner submits that the exclusionary rule of evidence set forth in Moulton, a rule which bound the California Supreme Court herein, does not fall within the protection contemplated by the drafters of the Sixth Amendment right to counsel. Thus, the People should not be precluded from introducing evidence that a defendant, while in custody pending trial for murder punishable by death and represented by counsel, solicited a district attorney's investigator to murder a prosecution witness.

Petitioner submits that this Court should repudiate the majority's conclusion in Moulton that evidence implicating a defendant in a new crime which is uncovered by law enforcement during the pendency of a separate prosecution wherein defendant is represented by counsel is admissible only at a separate trial on the new crime.

2. The California Supreme Court found that the failure of respondent's state trial counsel to object to the introduction of evidence that respondent, while pending prosecution for murder, solicited the murder of a prosecution witness was incompetence, and that this incompetence prejudiced respondent. Petitioner urges this Court to review this determination *de novo*[8].

---

8. If this Court grants certiorari on the first issue raised herein, disposition of this issue might be rendered moot.

The California Supreme Court correctly set forth the applicable standard of prejudice based on incompetence of defense counsel, i.e., a reasonable probability that, but for counsel's failings, the result would have been more favorable to respondent.

However, petitioner submits that the California Supreme Court gave inordinately short shrift to the People's evidence of respondent's guilt. The California Supreme Court thus opined that the evidence which it found, based on Massiah and Moulton, should have been excluded was so significant that reversal of respondent's convictions and death sentence was mandated.

Petitioner submits that the California Supreme Court unduly denigrated other evidence of respondent's guilt and ignored completely the fact that respondent offered virtually no defense to the

charged crimes. Thus, notwithstanding that the People's proof of respondent's culpability was almost entirely circumstantial, this proof was unrefuted.

This Court should therefore grant this petition for writ of certiorari to reinstate respondent's convictions for murder and robbery and his death sentence.

SUMMARY OF ARGUMENT

The Sixth Amendment right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding. In Massiah v. United States 377 U.S. 201 (1964), a rule excluding evidence allegedly obtained in violation of the Sixth Amendment right to counsel was announced. This exclusionary rule was extended further in Maine v. Moulton 474 U.S. 179 (1985).

Petitioner submits that the rule of exclusion set forth Massiah and Moulton does not fall within the protection

contemplated by the drafters of the Sixth Amendment right to counsel.

Justice White criticized the exclusionary rule established by the majority in Massiah in his dissent.

In Moulton, a bare majority of this Court extended the ill-conceived exclusionary rule of Massiah even further. Again, the majority's opinion was sternly rebuked in dissent. Then-Chief Justice Burger characterized the Moulton majority's decision to reverse the conviction in that case as "bizarre" and suggested the majority's decision "turns the Sixth Amendment on its head by first positing a constitutional violation and then asking whether 'alternative, legitimate reasons' for the police surveillance are sufficient to justify that constitutional violation."

The California Supreme Court, under the compulsion of the exclusionary rule set

forth by the majority opinions in Massiah and Moulton, found that certain evidence of respondent's solicitation to murder a prosecution witness was inadmissible at respondent's murder trial.

Petitioner urges this Court to repudiate the exclusionary rule created by the majorities in Massiah and Moulton because it is not within the protection contemplated by the framers of the Sixth Amendment right to counsel.

The California Supreme Court found, under the compulsion of Massiah and Moulton, that most of the evidence of respondent's solicitation of murder should have been excluded and that respondent's state trial counsel's failure to raise an objection to this evidence constituted incompetence, and, further, that this incompetence was prejudicial to respondent. Petitioner disagrees and urges this Court to review this finding *de*

novo.

Although primarily circumstantial, the evidence of respondent's guilt, aside from the murder solicitation evidence, was substantial and respondent offered no refutation of the People's proof. Thus, assuming arguendo, the murder solicitation evidence should have been excluded, the failure to exclude this evidence was not prejudicial to respondent.

Therefore, petitioner respectfully urges this Court to revisit the majority holdings in Massiah and Moulton and remove the exclusionary impediment engrafted onto the Sixth Amendment right to counsel by these decisions. This Petition for Writ of Certiorari should be granted in order to restore respondent's convictions and his sentence of death.

ARGUMENT

I

THE EXCLUSIONARY RULE SET FORTH IN Massiah v. United States 377 U.S. 201 (1964) AND Maine v. Moulton 474 U.S. 159 (1985), DOES NOT FALL WITHIN THE PROTECTION CONTEMPLATED BY THE DRAFTERS OF THE SIXTH AMENDMENT RIGHT TO COUNSEL.

The Sixth Amendment embodies "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself . . . ." (Johnson v. Zerbst, 304 U.S. 458, 462-463 (1938).) Thus, the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding.

Justice Black explained in Gideon v. Wainwright, 372 U.S. 335 (1963): "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." (Id., at p. 344.)

In Massiah v. United States 377 U.S. 201 (1964), a majority of this Court derived from the Sixth Amendment right to counsel an exclusionary rule of evidence. This exclusionary rule was extended further by the bare majority in Maine v. Moulton 474 U.S. 179 (1985).

Petitioner submits that the rule of exclusion set forth Massiah and Moulton does not fall within the protection contemplated by the drafters of the Sixth Amendment right to counsel.

In Massiah, the defendant was indicted, along with a man named Colson, for conspiracy to possess and to distribute cocaine. Massiah retained a lawyer, pleaded not guilty and was released on bail. Colson, meanwhile, decided to cooperate with Government agents in their continuing investigation of the narcotics activity in which Massiah and others were thought to be engaged. Colson permitted a

Government agent to install a radio transmitter under the front seat of his automobile. Massiah held a lengthy conversation with Colson in this automobile while a Government agent listened over the radio. Massiah made several incriminating statements, and these were brought before the jury through the testimony of the Government agent.

This Court reversed Massiah's conviction on the ground that the incriminating statements were obtained in violation of Massiah's rights under the Sixth Amendment. The majority stressed the fact that the interview took place after indictment, at a time when Massiah was clearly entitled to the assistance of counsel. Relying on Justice Douglas' concurrence in Spano v. New York, 360 U.S. 315 (1959), the majority concluded that the need for, and consequently the right to, the assistance of counsel applied

equally in this extrajudicial setting as at the trial itself. (Massiah v. United States, supra, 377 U.S., at p. 204.) Consequently, the majority held:

> "[Massiah] was denied the basic protections of [the right to the assistance of counsel] when there was used against him at trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." (Id., at p. 206.)

Justice White, dissenting in Massiah, wrote, ". . . I am unable to see how this case presents an unconstitutional interference with Massiah's right to counsel. Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed. It is

only a sterile syllogism -- an unsound one, besides -- to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence. The right to counsel has never meant as much before, . . . , and its extension in this case requires some further explanation, so far unarticulated by the Court." (Massiah, supra, dis. opn. of White, J., 377 U.S. at p. 209.)

In Moulton, a bare majority of this Court extended the ill-conceived exclusionary rule of Massiah even further. The Moulton majority observed that this Court has "made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the

right to counsel." (Maine v. Moulton, supra, 474 U.S. at p. 171.) The Moulton majority ultimately concluded that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." (Id., at p. 176.)

Having determined that the police had violated Moulton's right to counsel by investigating his possible involvement in a plot to kill prosecution witnesses, the Moulton majority then extrapolated from Massiah an exclusionary rule for evidence of ancillary crimes:

> "[L]aw enforcement officials investigating an individual suspected of committing one crime and formally charged with having committed another crime obviously seek to discover evidence useful at a trial of either

crime. In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in Massiah. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation

of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." (Id., at pp. 179-180, fns. omitted.)

In a subsequent footnote, the Moulton majority observed, in conclusory fashion, "Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." (Id., at p. 180, fn. 16.)

Then-Chief Justice Burger countered the Moulton majority's flimsy conclusion in a stinging dissent, observing, "Today the Court holds that the Sixth Amendment

prohibits the use at trial of postindictment statements made to a government informant, even where those statements were recorded as part of a good-faith investigation of entirely separate crimes. Nothing whatever in the Constitution or our prior opinions supports this bizarre result, which creates a new 'right' only for those possibly habitual offenders who persist in criminal activity even while under indictment for other crimes." (Maine v. Moulton, supra, dis. opn. of Burger, C.J., 474 U.S. at p. 181.)

The former Chief Justice accused the Moulton majority of "turn[ing] the Sixth Amendment on its head by first positing a constitutional violation and then asking whether 'alternative, legitimate reasons' for the police surveillance are sufficient to justify that constitutional violation." (Id., at p. 184.)

Petitioner submits that the Sixth Amendment right to counsel does not encompass the "bizarre" exclusionary rule which has been engrafted onto it by the majorities in Massiah and Moulton. As Chief Justice Rehnquist observed in United States v. Gouveia, 467 U.S. 180 (1984), "We have recognized that the `core purpose' of the counsel guarantee is to assure aid at trial, `when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." (Id., at pp. 188-189, citing United States v. Ash, 413 U.S. 300, 309 (1973).)

In the instant case, respondent solicited a fellow inmate to help him find a "hit man" who could "eliminate" a witness expected to testify at his murder trial. The inmate, Mr. Loar, contacted the prosecuting attorney's office. An investigator from the district attorney's

office then pretended to be a "hit man" in two telephone conversations with respondent which were tape recorded. Respondent spelled out his desire to have the witness take a "permanent vacation."

Because respondent was represented by counsel at the time of his phone conversations with the district attorney's investigator, the California Supreme Court, under the compulsion of the exclusionary rule set forth by the majority opinions in Massiah and Moulton, found that the tape recordings were inadmissible at respondent's murder trial.

The California Supreme Court thus found that respondent's Sixth Amendment right to counsel had been violated. This court further found that the admission of the tainted proof was not harmless error.

Petitioner submits that this Court can, and should, correct this horrific result. The exclusionary rule engrafted onto the

Sixth Amendment right to counsel by the majorities in Massiah and Moulton could not have been within the protection contemplated by the framers of the Constitution. In this case, the Massiah/Moulton exclusionary rule serves no valid judicial purpose.

Petitioner submits that respondent had literally nothing to lose by trying to regain his freedom, not by working with his trial counsel to disprove the People's evidence of his guilt but, rather, by eliminating the witness most likely to implicate him at trial.

If respondent's plan was successful, the witness would be killed and the probability of acquittal on the original murder charge greatly increased. At worst, if, as happened here, respondent's plan is discovered by law enforcement, evidence of the new murder plot would not be presented as evidence of consciousness

of guilt before the jury trying the original murder charge. In effect, then, respondent gets a free shot at committing a new crime, by virtue of the fact he is represented by counsel at the time. Such a spurious result should not be countenanced by this Court.

Therefore, petitioner respectfully urges this Court to reconsider the exclusionary rule set forth in Massiah and Moulton. Petitioner urges this Court to repudiate the exclusionary rule created by the majorities in Massiah and Moulton because it is not within the protection contemplated by the framers of the Sixth Amendment right to counsel.

II

RESPONDENT'S STATE TRIAL COUNSEL'S FAILURE TO MAKE A Massiah/Moulton OBJECTION DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL WITHIN THE MEANING OF Strickland v. Washington 466 U.S. 668 (1984).

The California Supreme Court found, under the compulsion of Massiah and Moulton, that most of the evidence of respondent's solicitation of murder should have been excluded and that respondent's state trial counsel's failure to raise an objection to this evidence constituted incompetence. Further, the California Supreme Court determined that respondent's state trial counsel's incompetence was prejudicial to respondent, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to respondent.

Petitioner urges this Court to address this issue *de novo*. Assuming arguendo, that the failure to object to the tape

recordings and the district attorney's investigator's testimony concerning the solicitation to murder a prosecution witness was incompetence, nevertheless this incompetence was not prejudicial within the meaning of Strickland v. Washington 466 U.S. 668 (1984).

As the California Supreme Court observed, and petitioner acknowledges, the bulk of the evidence tending to connect respondent to the charged murder was circumstantial. However, petitioner respectfully disagrees with the conclusion reached by the California Supreme Court that introduction of the allegedly tainted murder solicitation evidence (the tape recordings and the testimony of the district attorney's investigator) was so significant that had it been excluded there is a *reasonable probability* the result would have been more favorable to respondent.

The evidence at trial disclosed: that the victim had purchased a .38-calibre pistol shortly before the ill-fated trip to California; that the victim often carried large amounts of cash in a wallet affixed to his belt; that respondent had remarked to a friend that he was "tempted to knock Roy off and take the money because he could live good on four fucking thousand dollars;" that the victim, accompanied by another man, stopped to fill his van with gas at a station the night he was murdered; that the station attendant identified respondent from a photographic lineup as the person with the victim at the station that night; that the victim was shot twice in the head while he slept, apparently by a .38-calibre firearm; that the victim's wallet was missing and his belt was undone; that respondent's fingerprint was found inside the victim's van.

To this evidence, respondent offered no substantial rebuttal. Respondent's trial strategy conceded guilt of the crimes charged and focused instead on offering evidence in mitigation of the penalty. Thus, the conclusion reached by the California Supreme Court that exclusion of the allegedly tainted murder solicitation evidence would have made a result more favorable to respondent reasonably probable is untenable.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Petition for Writ of Certiorari be issued to the California Supreme Court.

DATED: 26 January 1993

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE H. WILLIAMSON, Chief
Assistant Attorney General
ROBERT R. ANDERSON, Senior
Assistant Attorney General

HARRY JOSEPH COLOMBO*
Deputy Attorney General

ATTORNEYS FOR PETITIONER
*Counsel of Record

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT PAUL WILSON, Defendant and Appellant.	)	S006546

Following the guilt phase of a jury trial, defendant Robert Paul Wilson was found guilty of one count of first degree murder (Pen. Code, §§ 187, 189)[1/] and one count of robbery (§ 211). The jury also found that defendant used a firearm in the commission of each offense (§ 12022.5, subd. (a)), and found true a special circumstance allegation that he committed the murder during the course of a robbery (§ 190.2, subd. (a)(17)(i)). Following the penalty phase of the trial, the jury imposed the death penalty.

---

1. All further statutory references are to the Penal Code unless otherwise indicated.

In the companion habeas corpus proceeding, we conclude that the judgment must be vacated in its entirety. (In re Wilson, post, p. ___.) Accordingly, we dismiss the appeal as moot but, in an attempt to avoid the recurrence of error on retrial, we discuss certain issues for the guidance of the parties and the trial court on remand.

FACTS

I. GUILT-PHASE EVIDENCE

A. The prosecution's case.

1. The crimes.

The victim Roy Swader resided in Tucson, Arizona. He would purchase tools in California and sell them at a "swap meet" in Tucson, regularly travelling to California every Monday and returning to Arizona the following day. He often carried substantial amounts of cash on his person in a "trucker's-wallet" affixed to his belt with a chain.

In 1984, defendant worked for Swader and resided with him temporarily. He often accompanied Swader on his trips to California. In late August 1984, approximately one week before the commission of the crimes, defendant was at the Tucson residence of Wayne Anderson and Sonia Craven (with whom defendant then was living), counting the sales proceeds from the swap meet. He told an acquaintance, Kimberly Christian (who also worked at the swap meet and knew Swader), that there were "four fucking thousand dollars" on the table, and that "he was tempted to knock Roy off and take the money because he could live good on four fucking thousand dollars."

In early September 1984, Swader bought a handgun at the swap meet and brought it home.

On the morning of September 4, Swader loaded his van and trailer to drive to California, and that evening drove them

into a Shell service station in Indio, California. Robert Berrie, the station attendant, recognized Swader, who had stopped at the station on previous occasions. Another man, whom Berrie described as "skinny," was with Swader. Swader entered the station mini-mart and told Berrie he wanted to purchase gas and a carton of milk. He then went out to refuel the van. The other man came into the mini-mart and filled a paper cup with Pepsi. Swader returned to pay for the various items, and Berrie gave him a receipt for the gas purchase. Swader was carrying a large black wallet with a chain attached.

On September 5, approximately noon, Swader's body was discovered in his van in the parking area of a park in Long Beach, California. He had been shot twice in the head; his belt was undone, and his wallet was missing. Swader's left front pants pocket was pulled out, and a $ 20 bill was

in a rear pocket. A pillow and a blanket were next to the body. The gas receipt from the Indio Shell service station was in Swader's shirt pocket. There was no evidence of forced entry into the van, and the two back doors were unlocked. A black T-shirt and a pair of jeans were found inside the van. The T-shirt subsequently was identified as one that defendant had worn. The jeans were much smaller than Swader's size.

A latent impression of defendant's left middle fingerprint was taken from the inside portion of the driver's door below the window of Swader's van.

On September 6, 1984, Detectives Miller and Collette of the Long Beach Police Department contacted Berrie at the Shell service station. Berrie identified Swader's van and trailer from photographs and confirmed that Swader had purchased gas at the station on September 4. On September 14, when the detectives returned

to the service station, Berrie identified defendant from a photographic lineup as the man who was with Swader on September 4. Berrie told the detectives he could positively identify that man, were he to see him in person. At the trial in May 1988, when asked whether he could identify that man in the courtroom, Berrie testified he was not positive and then pointed to an individual (not defendant) in the spectator portion of the courtroom.

On September 7, 1984, the Long Beach detectives travelled to Tucson to the former residence of Wayne Anderson and Sonia Craven, which those individuals had abandoned. A search of the premises revealed paperwork bearing defendant's name, indicating that defendant was from the State of Kansas.

At trial, Kimberly Christian testified that a few days after Swader's murder, she saw defendant at the swap meet in Tucson. Someone then informed her that Swader's

body had been found in California. The next day, Christian saw defendant with Anderson and Craven at their residence. Anderson had a van, which Christian assumed he had stolen, because Anderson had been "broke." When someone raised the subject of Swader's death, defendant became nervous and then left. Christian did not see defendant again prior to trial. She never again saw Anderson or Craven.

Defendant was arrested in Las Vegas, Nevada, in October 1984 and was returned to Los Angeles County. On January 23, 1985, he was arraigned in Los Angeles County Superior Court on charges of murdering and robbing Swader.

2. Testimony of Farrell Torregano.

In April 1987, Farrell Torregano was a fellow inmate with defendant at the Los Angeles County jail. On direct examination of this witness, the prosecution elicited the fact that

Torregano had "suffered a felony or two . . . ." Torregano testified that defendant, in the course of several conversations, confessed to committing the present crimes, stating that defendant had worked for a man named Swader, that defendant needed more money and had asked Swader for a loan, but that Swader would not lend him money. Defendant admitted to Torregano that he had shot Swader in the head twice as the victim slept. According to Torregano, defendant said he had left some money on the victim's person so that the killing would not appear related to a robbery, and then took the remaining money and fled.

3. Testimony of Donald Raymond Loar and Frank Kovacevich.

Donald Raymond Loar was a convicted felon who had testified at the request of the Los Angeles County District Attorney in other cases prior to his testimony in the present case. He testified that in

October 1987 he was in the protective custody unit of the Los Angeles County jail. He first met defendant while attending church services at the jail, and then was defendant's cellmate for approximately six to eight weeks. While the two men were "discussing cases," defendant told Loar that he was charged with murder and wanted a witness in Indio eliminated. Loar testified: "Well, we was discussing the cases and people, relatives and all of that. [¶] And my wife's godfather is Jimmy Hoffa, [sic] dad is secretary treasurer to the Teamster's union. [¶] [Defendant] felt that I had Mafia ties, I guess, and he told me that there was a witness that was a thorn in his side that could do him a lot of harm if he testified, that could put him and a murder victim together. [¶] And he wanted me to get somebody from back east or a hit man, so to speak, to get rid of the witness so he wouldn't have to worry

about -- about that guy in court. He would beat his murder case . . . . [¶] . . . He wanted the guy eliminated."

Loar testified that following this conversation, he telephoned the district attorney's office and spoke to Deputy District Attorney Hodgman about Loar's conversation with defendant. In doing so, Loar hoped that, in exchange for his cooperation, he would receive favorable treatment with regard to his own case.

Hodgman referred Loar to a district attorney's investigator, Frank Kovacevich, who in turn arranged to impersonate the "hit man"[1] whom defendant sought to contact. Loar placed a telephone call to Kovacevich from the jail, told Kovacevich that defendant wished to speak with him, and handed defendant the telephone. Loar testified that following the telephone conversation, defendant appeared relieved and happy, stating that the "problem is going to be resolved, that the guy he just

talked to is going to take care of the witness for -- for him." Loar testified that, at the request of Kovacevich, he arranged for a second telephone conversation between Kovacevich and defendant.

Kovacevich testified that on October 28, 1987, following a telephone call from Loar, he arranged to speak to defendant telephonically while impersonating a hired assassin. Kovacevich had two telephone conversations with defendant, both of which were tape-recorded. The tape recordings of the conversations (the transcriptions of which are set forth in relevant part in the margin below[2/]) were

---

2. When handed the telephone, defendant initiated the first conversation by telling Kovacevich that "we've got some business to take care of" in Indio. Pertinent portions of the conversation are as follows:
"[Defendant:] Okay. There is -- on the interstate 10 there is a exit ramp named Monroe. [¶] [Kovacevich:] Oh, what's the -- what's the name of that? [¶] [Defendant:] It's Monroe Street. . . . [¶] . . . go straight into Indio, the first gas station you come to is called

played to the jury at trial.

-- it's just called -- uh -- the She -- it's a Shell station. It's kind of a gas station/convenience store. . . . [¶] . . . There's a person there by the name of Bernie, B-u-r-r-i -- n-i-e, I think. . . . [¶] . . . Yeah. I believe it's Richard Bernie, I'm not positive about the first name. . . . [¶] . . . [Kovacevich:] Oh. Now -- now, what do you want done with this guy? [¶] [Defendant:] Uh -- wherever you -- I'm kind of in a tight scrape and this -- this crazy thing is going on with -- it's -- he's going to end up walkin in here and spitting out a bunch of lies which could put me in one hell of a whole lot of trouble. [¶] [Kovacevich:] Uh-huh. And what's this -- is this for -- what -- what's -- what is for . . . court appearance or what? [¶] [Defendant:] Yeah, that's basically what it's boiling down to. . . . [¶] . . . He doesn't need to be there. . . . [¶] . . . It would be -- let's put it this way, it would be most helpful if he wasn't. . . . [¶] . . . [Kovacevich:] Now, what do you -- what did you want done with this guy? I mean, do you want us -- do you want us to scare him or what? [¶] [Defendant:] Well, you -- well, you -- I don't think -- I think it's gonna come out a little bit more drastic than that. I think it's be better if he just kind of took a permanent vacation. . . ."

During the second telephone conversation, Kovacevich told defendant that his "guy" had visited the Shell station but that no one by the name of Richard Bernie worked there. Defendant confirmed the description of the station attendant and said that perhaps his name was "Barrie."

4. Evidence of defendant's indebtedness.

The prosecution offered into evidence the fact of defendant's prior conviction of felony theft in Kansas and the resulting condition of probation requiring that defendant make restitution in the amount of $ 13,007. The prosecution argued that evidence of a large restitutionary order, imposed nine months prior to the commission of the murder and the robbery, was probative of a motive for defendant to commit the present crimes. Defense counsel objected on the ground that the probative value of such evidence was outweighed by its prejudicial effect. (Evid. Code, § 352.) Although defense counsel maintained his objection to any evidence of indebtedness, on the ground of irrelevance, the trial court permitted a "sanitized" statement to be read to the jury to the effect that pursuant to court order imposed on December 29, 1983, "the

defendant was ordered to pay, to a governmental agency in the State of Kansas, the amount of $13,007 . . . ."

B. The defense case.

Defendant did not testify, and the defense presented no evidence. In closing argument, defense counsel argued that the circumstantial evidence was not inconsistent with a finding that defendant was not the perpetrator of the crimes.

The jury found defendant guilty of both charged offenses and found true the firearm-use enhancements, as well as the robbery-murder special circumstance.

II. PENALTY-PHASE EVIDENCE

A. The prosecution's case.

The prosecution and the defense stipulated that on December 2, 1983, defendant was convicted of the offense of felony theft in the State of Kansas. During closing argument, the prosecutor referred repeatedly to the guilt-phase evidence that defendant had solicited

Berrie's murder.

B. The defense case.

The defense presented evidence that defendant had cooperated with the prosecution in several other cases. A police investigator testified that in June 1986, defendant provided information to the Pasadena Police Department concerning another murder case. Defendant was subpoenaed to testify at the preliminary hearing of that case but was not called as a witness. A deputy district attorney testified that in 1987 defendant was a rebuttal witness at another murder trial.

A pastor testified defendant regularly attended bible-study classes conducted in jail. Defendant's wife testified that defendant did not have "a violent bone in his body." A longtime friend described defendant as a nonviolent person.

A clinical forensic psychologist opined that defendant suffered from minimal brain dysfunction and that the commission of the

murder was inconsistent with defendant's character.

At the conclusion of the penalty phase, the jury fixed the penalty at death.

DISCUSSION

I. GUILT-PHASE ISSUES

A. Ineffective assistance of counsel.

Defendant initially contends he was deprived of effective assistance of counsel guaranteed by the Sixth Amendment to the federal Constitution because of his counsel's allegedly deficient representation in numerous respects, including counsel's failure to object to the testimony of Loar and Kovacevich and to the tape recordings of the telephone conversations between defendant and Kovacevich.

Our past decisions establish, with regard to ineffective assistance of counsel claims, that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner

challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected. (People v. Pope (1979) 23 Cal.3d 412, 426; see People v. Mitcham (1992) 1 Cal.4th 1027, 1058; People v. Cox (1991) 53 Cal.3d 618, 659; People v. Bell (1989) 49 Cal.3d 502, 546.) As we explained in Pope, supra, 23 Cal.3d 412, 426, because, in general, it is inappropriate for an appellate court to speculate as to the existence or nonexistence of a tactical basis for a defense attorney's course of conduct when the record on appeal does not illuminate the basis for the attorney's challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a habeas corpus proceeding, in which the attorney has the opportunity to explain the reasons for his or her conduct. "Having afforded the trial attorney an

opportunity to explain, courts are in a position to intelligently evaluate whether counsel's acts or omissions were within the range of reasonable competence." (Id., at p. 426, fn. omitted.) We recommended in Pope that, "to promote judicial economy in direct appeals where the record contains no explanation, appellate counsel who wish to raise the issue of inadequate trial representation should join a verified petition for writ of habeas corpus." (Id., at pp. 426-427, fn. 17.)

In accordance with our recommendation in Pope, defendant's appellate counsel, following the completion of briefing in the appeal, filed a petition for writ of habeas corpus seeking relief from the judgment on the ground of ineffective assistance of trial counsel, corresponding to the claim asserted on appeal. The petition alleged that defendant was deprived of competent representation

because, among other things, his counsel failed to object to the admission at trial of the testimony of Loar and Kovacevich and the tape recordings, all of which evidence assertedly was inadmissible against defendant under Massiah v. United States (1964) 377 U.S. 201, 206, and its progeny. Following the filing of an informal response to the petition by the Attorney General, we concluded the petition stated a prima facie case and issued an order directing the Attorney General to show cause why the relief prayed for in the petition should not be granted.

The petition, return, and traverse, with supporting declarations and memoranda of points and authorities, established, with respect to trial counsel's failure to object to the testimony of Loar and Kovacevich and the tape recordings, that there were no disputed factual issues regarding either (1) the circumstances

underlying the testimony of Loar and Kovacevich, and the tape recordings, established by the appellate record and not controverted by the return, or (2) trial counsel's reasons for his failure to object. Accordingly, we determined that no evidentiary hearing was required with respect to defendant's claim of incompetence of counsel based upon this omission. (See In re Lawler (1979) 23 Cal.3d 190, 194 [if there are no disputed material factual allegations, the court may dispose of the petition without the necessity of an evidentiary hearing].)

For the reasons set forth in the accompanying opinion in the habeas corpus proceeding, we have concluded that the testimony of Kovacevich and a portion of the testimony of Loar, as well as the tape recordings of defendant's telephone conversations with Kovacevich, were inadmissible under Massiah v. United States, supra, 377 U.S. 201, and its

progeny; that counsel's failure to object to this evidence was the result of ignorance and a misinterpretation of these authorities, rather than an informed tactical decision; and accordingly, that counsel's omission constituted deficient performance. Concluding further that such deficient performance was prejudicial to petitioner, we have held that defendant was deprived of constitutionally guaranteed effective assistance of counsel at the guilt phase,, and that this error requires setting aside the judgment in its entirety.

In light of the disposition of the habeas corpus proceeding, there is no need to resolve any of the remaining ineffective-assistance-of-counsel claims or most of the other claims raised in the briefs on appeal. For the guidance of the parties and the trial court on remand, however, we shall address several issues, raised on appeal, that are likely to recur

on retrial.

B. Admission of photographs of the victim's wounds.

Over objection of defense counsel, the trial court admitted into evidence three photographs of the victim, showing his body on the floor of the van with two bullet wounds in the head. The prosecutor offered this evidence as probative of "the condition of the victim's body with the belt undone and the pocket pulled out," and as circumstantial evidence of the perpetrator's intent to kill.

Maintaining that the trial court erred in admitting these photographs, defendant argues they were irrelevant to any contested issue at trial and highly prejudicial.

The photographs were relevant in depicting the nature and placement of the wounds, thus supporting the prosecution's theory that the victim was shot deliberately while asleep and without a

struggle. (See People v. Price (1991) 1 Cal.4th 324, 441.) They also depicted the victim's belt undone, a circumstance supporting the prosecution's theory that his trucker's-wallet had been affixed to his belt and was removed by the assailant.

Defendant contends uncontradicted testimony established the location and condition of the victim's body and clothing and the nature of his wounds, and that the photographs therefore were merely cumulative. But "[w]e have often rejected the argument that photographs of a murder victim should be excluded as cumulative if the facts for which the photographs are offered have been established by testimony." (People v. Price, supra, 1 Cal.4th at p. 441; People v. Kaurish (1990) 52 Cal.3d 648, 684.) Because the photographic evidence could have assisted the jury in understanding and evaluating the testimony presented to them, the trial court's determination that such evidence

had sufficient probative value to warrant its admission was not erroneous.

Finally, a trial court has broad discretion in determining the admissibility of murder-victim photographs in the face of a claim that they are unduly gruesome or inflammatory. (See People v. Price, supra, 1 Cal.4th at p. 441.) Here, the record reflects the trial court weighed the probative value of the photographs against their potential prejudicial effect before admitting them, thereby properly exercising its discretion. Moreover, our independent review of the photographs persuades us they were not unduly shocking or inflammatory. (See People v. Turner (1990) 50 Cal.3d 668, 707.) We find no abuse of discretion.

C. Admission of evidence of indebtedness.

Defendant contends the trial court erred in admitting evidence of the debt he

owed to the State of Kansas in the amount of $13,007. The court ruled, over defense counsel's objection, that the evidence of indebtedness was relevant to prove a possible motive for the commission of the crimes.

We agree with defendant's claim that the trial court erred in admitting evidence of this debt. Evidence of a defendant's poverty or indebtedness generally is inadmissible to establish motive to commit robbery or theft, because reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and the probative value of such evidence is considered outweighed by the risk of prejudice. (People v. Edelbacher (1989) 47 Cal.3d 983, 1024; People v. Hogan (1982) 31 Cal.3d 815, 854.) Under certain circumstances, however, evidence of poverty or indebtedness may be relevant and admissible for limited purposes, such as to refute a defendant's claim that he

did not commit the robbery because he did not need the money. (People v. Gorgol (1953) 122 Cal.App.2d 281, 303.)

In the present case, the evidence of defendant's debt was admitted for the improper purpose of establishing defendant's motive to commit the robbery and murder, and was not admissible on any proper ground. Defendant did not testify at trial that he did not need any money. The probative value of the evidence of debt therefore was outweighed by its prejudicial effect, and this evidence should not have been admitted at trial.

D. Claims of instructional error.

Defendant asserts various instructional errors occurred at the guilt phase.

1. Instruction on other-crimes evidence.

Defendant contends the trial court erred in giving CALJIC No. 2.50,[3/]

---

3. All CALJIC references are to California Jury Instructions -- Criminal (5th ed. 1988) or to instructions which correspond to the identically numbered

pertaining to evidence of other crimes admitted to prove the identity of the perpetrator. Defendant maintains that the evidence adduced before the jury was insufficient to support a finding that he had committed any crime other than the charged offenses or, alternatively, to support a finding of such other crime probative of his identity as the perpetrator of the charged offenses, and that the instruction therefore was improper.

We disagree. As set forth ante, the prosecution introduced evidence -- the testimony of Loar -- that defendant had attempted to solicit the murder of Berrie, a critical prosecution witness.[4]

---

instructions in CALJIC fifth edition, unless otherwise indicated.

4. The testimony of Loar relating his conversations with defendant prior to Loar's telephone call to the district attorney's office was admissible for the reasons set forth in our accompanying opinion in the habeas corpus proceeding.

Solicitation of murder is a criminal offense. (§ 653f, subd. (b).) Evidence of uncharged offenses is admissible under Evidence Code section 1101, subdivision (b), if relevant to prove some fact (such as identity, motive, or knowledge) other than the defendant's disposition to commit such offenses.

Defendant's act of soliciting the murder of a critical prosecution witness was highly probative of defendant's consciousness of guilt, which in turn was probative of his identity as the perpetrator of the charged offenses. (See People v. Edelbacher, supra, 47 Cal.3d at pp. 1006-1007.) The trial court's instruction therefore was justified by the evidence.

Defendant further contends the trial court erred in failing to specify the "other crime" which the jury could consider in determining the issue of identity, thereby improperly allowing the

jury to consider the evidence of his prior conviction of theft. Defendant's contention has no merit, because the record establishes that evidence of this prior conviction was not received at the guilt phase; only the fact of defendant's indebtedness to the State of Kansas was admitted into evidence at that stage of the proceedings.

2. Failure to instruct on second degree murder

Defendant contends the trial court erred in refusing instructions requested by defense counsel on second degree murder. The court determined there was insufficient evidence to support the giving of instructions on this lesser offense. Defendant maintains that the refused instructions were warranted because the circumstantial evidence of the crimes did not conclusively establish that the murder was committed during the course of a robbery. He contends the evidence

was not inconsistent with the theory that defendant shot and killed the victim in the van and then fled, and that another person then came upon the victim's body and removed the wallet, or that the victim was not carrying a wallet or cash at the time he was shot.

We conclude the trial court did not err in refusing an instruction on second degree murder. The evidence did not support the factual scenarios now advanced by defendant. The victim, last seen carrying a trucker's-wallet attached with a chain to his belt, was discovered after his death with his belt undone, and with his wallet and most of his cash missing. Also, the victim had been shot twice in the head, indicating a deliberate, purposeful killing. There is only bare speculation, not substantial evidence, to support the theory presently advanced by defendant -- that the murder did not coincide with the taking of the victim's

money. Speculation is an insufficient basis upon which to require the giving of an instruction on a lesser offense. (See People v. Duncan (1991) 53 Cal.3d 955, 970-971; People v. Lewis (1990) 50 Cal.3d 262, 276.)

Defendant's reliance on Beck v. Alabama (1980) 447 U.S. 625 for the proposition that, regardless of the evidence, the court was required to give an instruction on second degree murder, is misplaced. In Beck, the high court struck down as unconstitutional a state statute which prohibited instructions on lesser offenses in a capital case, thereby limiting the jury's options to either convicting or acquitting the defendant of the capital crime. The court held that such a restriction was contrary to the long-settled rule that a "'defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him

guilty of the lesser offense and acquit him of the greater.'" (Id., at p. 635.)

In the present case, the trial court had the option of instructing on the lesser offense at the defendant's request, should the evidence warrant such instruction. The evidence did not. Unlike the trial court in Beck v. Alabama, supra, 447 U.S. 625, the trial court in the present case was not restricted to an all-or-nothing approach regardless of the evidence.

3. Failure to instruct sua sponte on the lesser included offense of theft.

Defendant contends the trial court erred in failing to instruct sua sponte on theft, a lesser included offense of robbery. In support of this contention, he again urges that the evidence did not preclude a finding of the following factual scenarios, among others: that defendant shot the victim and thereafter developed the intent to take the wallet,

or that defendant took the wallet while the victim was asleep and sometime thereafter decided to shoot him. Under either scenario, defendant argues, he would be guilty of theft, not robbery.

We find no error. A trial court must instruct on a lesser included offense when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of the lesser offense. (See People v. Duncan, supra, 53 Cal.3d at p. 970; People v. Lewis, supra, 50 Cal.3d 262, 276.) In People v. Kelly (1992) 1 Cal.4th 495, 529, the evidence (that the defendant formed the intent to steal only after the killing) required instruction on the lesser included offense of theft. In contrast, in the present case, there was no evidence to support the theory that the underlying offense, if committed by defendant, was other than robbery.

Speculation is an insufficient basis upon which to require the trial court to give an instruction on a lesser included offense.

4. Claim that jury instructions on circumstantial evidence undermined the "reasonable doubt" standard

Defendant contends the trial court's instructions on circumstantial evidence negated the instructions on the presumption of innocence, as well as the standard of proof beyond a reasonable doubt. -

The trial court instructed the jury concerning circumstantial evidence in the terms of CALJIC Nos. 2.00 (direct and circumstantial evidence -- inferences), 2.01 (sufficiency of circumstantial evidence -- generally), 2.02 (sufficiency of circumstantial evidence to prove specific intent), 8.83 (sufficiency of circumstantial evidence to prove the special circumstance), and 8.83.1 (sufficiency of evidence to prove mental

state).

CALJIC No. 2.01 informs the jury they may not base a finding of guilt on circumstantial evidence "unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion."

This instruction's concluding paragraph (with which defendant takes issue) provides: "If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

Defendant challenges this last paragraph as well as the corresponding paragraphs in CALJIC Nos. 8.83 and 8.83.1, which pertain to the consideration of circumstantial evidence relating to the special circumstance allegation. He

argues essentially that such language negates the presumption of innocence and the standard of proof beyond a reasonable doubt, because it allows the jury to convict merely by finding the prosecution's theory of the case "reasonable" and the defense theory of the case "unreasonable," thus compelling the jury to reject a defense theory which is unreasonable but also true. He also contends the instructions impermissibly create a mandatory conclusive presumption of guilt upon the jury's finding that an interpretation of the evidence unfavorable to the defense is reasonable.

We disagree. "'It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (People v. Crandell (1988) 46 Cal.3d 833, 874, quoting People v. Burgener (1986) 41

Cal.3d 505, 538; see People v. Magana (1990) 218 Cal.App.3d 951, 956.) Here, CALJIC No. 2.01 makes clear that circumstantial evidence is sufficient to prove guilt only if it "cannot be reconciled with any other rational conclusion." The words "rational" and "reasonable" in the context of CALJIC No. 2.01 must be read in conjunction with the instruction on reasonable doubt (CALJIC No. 2.90). (See People v. Magana, supra, 218 Cal.App.3d at p. 956.) That instruction informs the jurors that in the event they harbor a reasonable doubt concerning guilt, they are required to acquit. Reasonable doubt is that state of the case where consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (§ 1096.)

Therefore, a reasonable juror would

understand that, taken in context, the relevant language of CALJIC No. 2.01 (and the corresponding language of CALJIC Nos. 8.83 and 8.83.1) must be considered in conjunction with the "reasonable doubt" standard. Thus, the jury properly can find the prosecution's theory as to the interpretation of the circumstantial evidence "reasonable" and alternate theories favorable to the defense "unreasonable," within the meaning of these instructions, only if the jury is convinced beyond a reasonable doubt of the accuracy of the prosecution's theory. (People v. Magana, supra, 218 Cal.App.3d at p. 956.) The paragraph criticized by defendant therefore "does not tell the jury to reject interpretations of circumstantial evidence favorable to the defense simply because they are unusual or bizarre, [but] merely tells them to reject interpretations of circumstantial evidence that are so incredible or so devoid of

logic that they can, beyond a reasonable doubt, be rejected." (Ibid.) Accordingly, when the instructions are viewed as a whole, the disputed language does not undermine the instructions on the presumption of innocence and the standard of proof beyond a reasonable doubt, and does not impermissibly create a mandatory conclusive presumption of guilt.

DISPOSITION

As noted, in the companion habeas corpus proceeding (In re Wilson, post, p. ___), we have concluded that the underlying judgment must be vacated in its entirety on the ground of ineffective assistance of counsel. Accordingly, the appeal is moot and is ordered dismissed.

GEORGE, J.

WE CONCUR:

LUCAS, C.J.
MOSK, J.
PANELLI, J.
KENNARD, J.
ARABIAN, J.
BAXTER, J.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re ROBERT PAUL WILSON	)	
	)	S027645
on Habeas Corpus.	)	
	)	

While his appeal from a judgment imposing the death penalty was pending before this court, petitioner Robert Paul Wilson filed the petition for writ of habeas corpus which gave rise to the present proceeding. As noted in our opinion in the accompanying decision in the appeal (People v. Wilson, ante, p. ___), the habeas petition reiterated petitioner's contention, raised on appeal, that numerous failings by his trial counsel deprived him of his constitutional right to the effective assistance of counsel. Concluding that the petition stated a prima facie claim for relief, we issued an order to show cause returnable before this court and ordered that the matter be argued with the automatic appeal.

For the reasons discussed hereafter, we conclude that petitioner's claim is meritorious and that the judgment must be set aside in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background leading to petitioner's conviction, sentence of death, and the present habeas corpus proceeding, is set forth in full in the companion case of People v. Wilson, ante, at pages ___ to ___ [typed maj. opn. at pp. 2 to 11] and need not be repeated here.

In the habeas corpus petition, petitioner alleges, among other things, that he was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment to the federal Constitution and article 1, section 15, of the California Constitution, because his trial counsel provided deficient representation in numerous respects, which included the failure (1) to object to or

in any other way seek exclusion from evidence of the testimony of inmate Donald Raymond Loar and government witness Frank Kovacevich, and the tape recordings of telephone conversations between petitioner and Kovacevich; (2) to investigate evidence which would have undermined the reliability of the testimony of Loar and inmate Farrell Torregano; (3) to cross-examine Torregano; and (4) to give a competent closing argument.[1/]

Concluding the petition stated a prima facie case entitling petitioner to habeas corpus relief, we issued an order to show cause, directing the filing of a return and a traverse. We determined, on the basis of the return and the traverse, that there were no disputed factual issues requiring an evidentiary hearing with

---

1. Petitioner further alleges that these failings by trial counsel resulted in a conviction and sentence of death in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments to the federal Constitution.

respect to the ineffective assistance of counsel claim which was based upon trial counsel's failure to raise an objection under Massiah v. United States (1964) 377 U.S. 201, 206, and Massiah's progeny, to the testimony of Loar and Kovacevich and the tape recordings.

As we explain, we conclude that petitioner's claim of ineffective assistance of counsel, based upon counsel's failure to raise a Massiah objection to the testimony and tape recordings, has merit and that petitioner is entitled to habeas corpus relief on that ground. We therefore need not and do not discuss the other alleged failings of trial counsel set forth in the habeas corpus petition.

DISCUSSION

Petitioner contends he was deprived of effective assistance of counsel guaranteed by the Sixth Amendment to the federal Constitution and article 1, section 15, of

the California Constitution, because his counsel failed to object to the admission of the testimony of Loar and Kovacevich, relating petitioner's incriminating statements, and to the tape recordings of the telephone conversations between petitioner and Kovacevich. Petitioner contends this evidence, as the product of state action deliberately designed to elicit from him incriminating statements in the absence of counsel, was inadmissible under Massiah v. United States, supra, 377 U.S. 201, 206, and its progeny.

To establish ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability

that, but for counsel's failings, the result would have been more favorable to the petitioner. (Strickland v. Washington (1984) 466 U.S. 668, 687; People v. Mitcham (1992) 1 Cal.4th 1027, 1057-1058.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Strickland, supra, 466 U.S. at p. 694.)

In the present case, the Attorney General argues with respect to the first prong, i.e., deficient performance of trial counsel, that petitioner's contention fails because the Massiah claim cannot be sustained on its merits, and, thus, trial counsel was not deficient in failing to raise a nonmeritorious objection. The Attorney General further argues, with respect to the second prong, i.e., prejudice, that even if counsel's performance was deficient, the failure to raise the Massiah objection was not prejudicial under the applicable standard.

We address each of these points in turn.

A. Merits of the Massiah claim.

In Massiah, supra, 377 U.S. 201, the United States Supreme Court held that once an adversary criminal proceeding has been initiated against the accused, and the defendant's constitutional right to the assistance of counsel has attached, any incriminating statement the government deliberately elicits from the defendant in the absence of counsel is inadmissible at trial against that defendant. (Id., at pp. 206-207.) Subsequent to its decision in Massiah, the high court elucidated the scope of its proscription against affirmative governmental conduct designed to elicit incriminating statements from a defendant entitled to the assistance of counsel. In Kuhlmann v. Wilson (1986) 477 U.S. 436, the court stated that in order to prevail on a Massiah claim involving use of an informant, the defendant must demonstrate that both the government and

the informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. (477 U.S. at p. 459.) For example, no violation of Massiah occurs where an informant-cellmate is simply a "listening post" and does not ask questions or solicit information. (Id., at pp. 459-460; People v. Hovey (1988) 44 Cal.3d 543, 561.)

Furthermore, attachment of the right to counsel with regard to one charge does not immunize a defendant from investigation of other criminal conduct, and "incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are . . . admissible at a trial of those offenses." (Maine v. Moulton (1985) 474 U.S. 159, 180, fn. 16; see McNeil v. Wisconsin (1991) ___ U.S. ____, ____ [111 S.Ct. 2204, 2207]; People v. Sully (1991) 53 Cal.3d 1195, 1234.) Incriminating statements obtained in

circumvention of a defendant's right to counsel with respect to a charged offense, however, are inadmissible at the trial of that charged offense even if they pertain to a new and uncharged crime. (Maine v. Moulton, supra, 474 U.S. at pp. 178-180; Mealer v. Jones (2d Cir. 1984) 741 F.2d 1451, 1453-1454.)

Maine v. Moulton, supra, 474 U.S. 159, illustrates the foregoing principles. There, Moulton pleaded not guilty to charges of theft. He subsequently met with his codefendant, Colson, to prepare for the upcoming trial. According to Colson, Moulton suggested the possibility of killing a state witness. Thereafter, Colson met with the police and confessed to his participation with Moulton in the commission of the thefts, agreeing to testify against Moulton and cooperate with the police if no further charges would be brought against him. He told the police about Moulton's proposal to kill the

witness.

Having learned from recorded telephone conversations that Colson and Moulton were going to meet in order to plan defense strategy, the police obtained Colson's consent to be equipped with a body-wire transmitter to enable the officers to record the meeting. A government officer later testified at trial that one of the purposes in doing so was to record any further conversations relating to threats to witnesses. Although Colson was instructed not to attempt to question Moulton, Colson's remarks during the meeting in fact tended to elicit incriminating statements from Moulton relating to the pending charges. Moulton also referred to, but then rejected, the idea of eliminating witnesses.

At trial, the state offered into evidence portions of the tape recordings of this meeting relating to the pending charges. The state did not offer the

portion during which the two men discussed the possibility of killing witnesses. Following a conviction and appeal, the high court reversed, holding the state had violated Moulton's Sixth Amendment right to counsel when it arranged to record conversations between Moulton and its undercover informant, Colson. The court stressed that "because Moulton thought of Colson only as his codefendant, Colson's engaging Moulton in active conversation about their upcoming trial was certain to elicit statements that Moulton would not intentionally reveal -- and had a constitutional right not to reveal -- to persons known to be police agents. Under these circumstances, Colson's merely participating in this conversation was 'the functional equivalent of interrogation.'" (Maine v. Moulton, supra, 474 U.S. at p. 177, fn. 13.)

The court then addressed the government's argument that the

incriminating statements made by Moulton properly were admitted because the police had had a legitimate reason to investigate Moulton's alleged plan to kill a witness. The court's analysis of this issue is particularly pertinent to our resolution of petitioner's claim in the present case.

Although recognizing that law enforcement officers investigating an individual already charged with certain crimes may have a legitimate interest in investigating new or anticipated crimes, the court held that the government's investigative powers, in seeking evidence relating to the pending charges, were limited by the Sixth Amendment rights of the accused. Consequently, incriminating statements pertaining to pending charges were held to be inadmissible at the trial of those charges, even though obtained incident to an investigation of other suspected criminal activity for which no charges were pending, if in obtaining this

evidence the government improperly circumvented the accused's right to the assistance of counsel. (Maine v. Moulton, supra, 474 U.S. at pp. 179-180.) The court noted that incriminating statements pertaining to the other uncharged criminal activity would be admissible at a trial of such other crimes. (Id., at p. 180, fn. 16.)

In the present case, we agree with the Attorney General's contention that, under the foregoing federal decisions, Loar's initial jailhouse conversations with petitioner, prior to his contacting the district attorney's office, did not violate petitioner's federal or state constitutional right to counsel. Loar, prior to contacting the district attorney's office, was not acting as a government agent; petitioner does not allege that either the police or the district attorney requested at that time that Loar solicit information from

petitioner, or that either agency had any contact whatsoever with Loar relating to petitioner (or to the present murder prosecution) prior to Loar's telephone call to the district attorney's office. Accordingly, petitioner's statements to Loar, concerning petitioner's desire to find a "hit man" to eliminate a possibly troublesome witness in his murder case, were not elicited improperly from him by a government agent. (See People v. Williams (1988) 44 Cal.3d 1127, 1141 [police policy of encouraging inmates to provide useful information does not transform them into government agents].) The proscriptions of Massiah v. United States, supra, 377 U.S. 201, therefore do not apply to Loar's testimony relating the incriminating statements made by petitioner to Loar prior to the latter's telephone call to the district attorney's office.

On the other hand, we reject the Attorney General's claim that Massiah and

its progeny do not render inadmissible Kovacevich's testimony and the tape recordings of Kovacevich's conversation with petitioner, or Loar's testimony relating petitioner's statements (and describing petitioner's demeanor) following the recorded telephone conversations.

Acknowledging that Kovacevich, unlike Loar, was a government agent from the outset, the Attorney General nonetheless advances a number of theories to support his argument that Kovacevich's conversations with petitioner did not violate Massiah v. United States, supra, 377 U.S. 201. We consider each of these arguments in turn.

The Attorney General initially asserts that because it was petitioner, and not a government agent, who initiated the contact with Kovacevich by asking Loar to find an assassin, the incriminating remarks cannot be considered the product

of deliberate governmental action. A similar argument, however, was made and rejected in Maine v. Moulton, supra, 474 U.S. 159. In Moulton, the state argued that the Massiah rule applies only when the police arrange the conversation between the accused and the police agent in which the incriminating statements are elicited; because the defendant Moulton rather than his codefendant Colson requested the critical meeting at which the incriminating remarks were made, the state maintained no violation of Moulton's Sixth Amendment rights occurred. The high court disagreed, holding that the identity of the party who instigates the meeting at which the government obtains incriminating statements is not a decisive factor, or even an important one. (474 U.S. at p. 174.) In the present case, although petitioner instigated the telephone call, Kovacevich actively engaged him in conversation by impersonating an assassin

and making inquiries as to petitioner's plan.

In his return to the petition, the Attorney General asserts that People v. Catelli (1991) 227 Cal.App.3d 1434 provides support for his interpretation of the Massiah line of authority. In Catelli, the cellmate of the defendant contacted the district attorney's office, informing that office that the defendant had confessed to him the crimes with which the defendant was charged and had expressed a desire to intimidate certain anticipated prosecution witnesses. Ultimately an undercover police officer arranged to meet with the defendant at the jailhouse to impersonate a friend of the cellmate who would be willing to intimidate the witnesses. The meeting took place in the visiting room of the jailhouse. After the police officer identified himself as the friend of the cellmate, the defendant displayed two

handwritten notes stating that he wanted someone to intimidate the prosecution's witnesses. The defendant then discussed with the officer the content of the notes, and the discussion surreptitiously was tape-recorded.

At trial, over defense objection, the handwritten notes and the tape recordings were admitted into evidence. Following his conviction of the charged offenses, the defendant appealed, asserting the admission of the notes and tape recordings violated his rights under Massiah. The court upheld the admission of the notes, concluding that the defendant had displayed them on his own initiative without government elicitation. The court, however, further concluded that the admission of the tape-recorded conversation, during which the officer asked a number of questions designed to elicit incriminating statements from the defendant, constituted Massiah error.

(People v. Catelli, supra, 227 Cal.App.3d at p. 1444.) The court finally concluded that the Massiah error was harmless on the facts of that case. (Id., at p. 1445.)

The Attorney General contends Kovacevich's conduct in the course of the tape-recorded telephone conversations with petitioner is comparable to the police officer's passive observation of the notes displayed by the defendant in People v. Catelli, supra, 227 Cal.App.3d 1434. We disagree. Assuming, without deciding, that Catelli properly applied Massiah and its progeny in upholding the admission of the notes displayed by the defendant in that case, we conclude Catelli is inapposite to the circumstances of the present case. Here, Kovacevich clearly did not act as a passive listening post in his telephone conversations with petitioner but, as we have stated, affirmatively impersonated a "hit man" and actively participated in the

conversations.

The Attorney General finally argues that evidence of petitioner's telephone conversations with Kovacevich was admissible because it pertained solely to an anticipated crime -- the plan to eliminate a potential witness -- and not to the crimes with which he was charged. The Attorney General again misconstrues Maine v. Moulton, supra, 474 U.S. 159, which, as already explained, holds that government agents may elicit incriminating statements from a defendant concerning suspected crimes other than pending charges, but that such statements are not admissible against the defendant at the trial of the pending charges, because, at the time such evidence was elicited, the defendant was entitled to the assistance of counsel with respect to those charges. In the present case, petitioner's remarks, although they do not refer directly to the charged offenses of murder and robbery,

were highly incriminating as to the pending charges and were elicited in direct violation of petitioner's right to counsel with respect to those charges. Therefore, evidence relating these remarks was inadmissible at the trial of the pending charges.

For these reasons, although we agree with the Attorney General that, in light of the merits of the Massiah claim, defense counsel was not deficient in failing to object to the testimony of Loar relating the incriminating statements made by petitioner prior to Loar's contacting the district attorney's office, we cannot so conclude with regard to defense counsel's failure to object to the testimony of Kovacevich, to the remaining testimony of Loar, or to the tape recordings of petitioner's telephone conversations with Kovacevich. Governing decisions of the United States Supreme Court compel the conclusion that this

evidence should have been excluded.

The Attorney General does not contend that trial counsel's failure to seek exclusion of the highly incriminating testimony and tape recordings was the result of a considered or informed tactical decision. Indeed, the declaration of petitioner's trial counsel (Ronald Slick), attached as an exhibit in support of the return, precludes any such assertion. In his declaration, trial counsel states that his omission was based upon his legal opinion that such evidence was properly admissible. He declares: "[I] did not enter an objection to this evidence because I believed then, as I do now, that this evidence was clearly admissible. That is, I did not believe then nor do I now, that there was any colorable argument for excluding this testimony. [¶] I am conversant with the decisions in Massiah v. United States (1964) 377 U.S. 201, and Maine v. Moulton

(1985) 474 U.S. 159, and I do not believe that these cases provide any basis whatsoever for excluding the testimony of Mr. Loar and Mr. Kovacevich. In my view, this testimony was simply foundational, that is, needed to authenticate the tape recordings of the phone conversations between these witnesses and the defendant. Thus, since I felt that the tapes were admissible, and would be admitted over any objection that I might interpose, I did not feel obliged to object to the testimony of the witnesses that would lay the foundation for the tapes as such an objection would only be an exercise in futility."

Trial counsel's declaration establishes that his failure to object at petitioner's 1988 trial to the testimony and tape recordings was not based on an informed and considered tactical determination, but resulted instead from ignorance or an erroneous interpretation of previously

decided, controlling United States Supreme Court cases.[2/] Counsel's failure to raise a meritorious objection to incriminating evidence as a result of ignorance or misunderstanding of the holding of clearly applicable precedent of the United States Supreme Court, rather than because of an informed tactical determination, constitutes deficient performance, i.e., representation which falls below the standard of competence demanded of

---

2. Prior to Maine v. Moulton, supra, 474 U.S. 159, there was a conflict among federal circuit courts of appeal as to whether incriminating statements made by a defendant relating to a charged offense are admissible, notwithstanding Massiah v. United States, supra, 377 U.S. 201, at the trial of that offense if they were obtained coincidentally in the course of an investigation of a new, uncharged crime. (See, e.g., United States v. DeWolf (1st Cir. 1982) 696 F.2d 1; Grieco v. Meachum (1st Cir. 1976) 533 F.2d 713, 717; cf. Mealer v. Jones, supra, 741 F.2d 1451.) In Maine v. Moulton, supra, 474 U.S. 159, decided years prior to the 1988 trial in the present case, the United States Supreme Court resolved that conflict, holding that such statements are inadmissible at the trial of the charged offense.

criminal defense attorneys. (See People v. Robertson (1982) 33 Cal.3d 21, 41-42; People v. Pope (1979) 23 Cal.3d 412, 425-426.)

Thus, on the basis of trial counsel's uncontradicted declaration provided by the Attorney General, we conclude that petitioner has met his burden of establishing the first prong of his ineffective assistance of counsel claim, deficient performance on the part of his trial attorney.

B. Prejudice.

The Attorney General maintains that even if tral counsel's failure to raise a Massiah objection constituted deficient performance, such omission was not prejudicial to petitioner because of the assertedly strong circumstantial evidence, independent of the objectionable testimony and tape recordings, of petitioner's guilt.

As stated previously, to obtain relief

on the basis of ineffective assistance of counsel, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." (Strickland v. Washington, supra, 466 U.S. 668, 693.) Rather, the defendant must establish a reasonable probability that, but for counsel's errors, the result would have been more favorable to the defendant. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (Id., at p. 694.) We conclude that counsel's failing was prejudicial under this standard. Nothing in the prosecution's case directly linked petitioner to the crimes. At the time of his arrest, petitioner was not found in possession of the victim's trucker's-wallet or any other item associated with the victim or the crimes. There was no evidence that petitioner displayed large amounts of cash or new possessions when he appeared in Tucson a

few days after the victim's body was found. Furthermore, there was no evidence that petitioner was present with the victim at or around the time of the commission of the crimes. Although it was established that petitioner often accompanied the victim on his trips to California, and the prosecution witness Berrie identified petitioner's photograph as depicting the man who was with the victim the day before the victim's body was found, Berrie was unable to make an in-court identification of petitioner as that man and, in fact, in court identified another person as the individual in question.

Although Loar testified to petitioner's statements (made prior to Loar's contacting the district attorney's office) that petitioner was looking for a "hit man" to eliminate a witness, Loar's testimony was far from being unimpeached, in that he admitted on direct examination

that he was a convicted felon who had testified at the request of the Los Angeles County District Attorney in other cases prior to his testimony in the present case.

Finally, although Torregano testified that petitioner had confessed commission of the crimes, Torregano's testimony, like that of Loar, did not go unimpeached. On direct examination, he admitted having "suffered a felony or two," and petitioner's trial counsel during closing summation argued without objection by the prosecution that the jury should disregard this witness's testimony because he was in custody with serious charges pending against him and had something to gain by contacting the police regarding petitioner's case.

Moreover, evidence was received which tended to link parties other than petitioner to the commission of the crimes. Shortly after the victim's body

was found in California, Wayne Anderson, known to be "broke," was observed with a new van, and he and Sonia Craven disappeared from Tucson shortly thereafter. The police, in their investigation of the charged offenses, spent 40 to 60 hours searching for Anderson and Craven.

In contrast to the foregoing evidence, the testimony of Kovacevich, and in particular the tape recordings of the telephone conversations between petitioner and Kovacevich, were highly incriminating, undoubtedly comprising the strongest evidence against petitioner. Although, apart from this evidence, the prosecutor still would have been able to introduce the testimony of Torregano and a portion of Loar's testimony relating petitioner's admissions, that testimony -- coming from jailhouse informants whose testimony was inherently suspect -- would have been much less credible without the confirmation

supplied by petitioner's own tape-recorded statements.

Indeed, the prosecutor, at trial, acknowledged and argued to the jury that the objectionable testimony and tape-recorded telephone conversations constituted the strongest evidence against petitioner. During closing argument, the prosecutor displayed to the jury a chart delineating the various categories of the prosecution's evidence, and set apart the testimony of Loar and Kovacevich and the tape recordings, describing this evidence as the most important part of the prosecution's case.

For these reasons, in light of the significance of the evidence that would have been excluded had counsel provided constitutionally effective representation at trial, we conclude there is a reasonable probability, i.e., a probability sufficient to undermine confidence in the outcome of petitioner's

trial, that the result would have been different but for counsel's deficient performance.

Having determined that petitioner has met his burden of establishing that counsel's deficient performance was prejudicial to the defense, we conclude that petitioner was deprived of the effective assistance of counsel guaranteed by the federal and state Constitutions. Accordingly, petitioner is entitled to the habeas corpus relief which he seeks.

DISPOSITION

The petition for writ of habeas corpus is granted. The judgment is vacated in its entirety. Petitioner is remanded to the Superior Court of Los Angeles County. Upon finality, the clerk shall remit a certified copy of this opinion to the superior court for filing, and respondent shall serve another copy thereof on the prosecuting attorney in conformity with section 1382, subdivision (a)(2). (See In

re Sixto (1989) 48 Cal.3d 1247, 1265.)

GEORGE, J.

WE CONCUR:

LUCAS, C.J.
MOSK, J.
PANELLI, J.
KENNARD, J.
ARABIAN, J.
BAXTER, J.

APPENDIX C

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

R E M I T T I T U R

TO THE SUPERIOR COURT, COUNTY OF LOS ANGELES

THE PEOPLE
RESPONDENT

VS.

WILSON, ROBERT PAUL
APPELLANT

SUPREME COURT NUMBER: S006546
SUPERIOR COURT NUMBER: A029492

I, ROBERT F. WANDRUFF, CLERK OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, DO HEREBY CERTIFY THAT THE ATTACHED IS A TRUE COPY OF AN ORIGINAL JUDGMENT ENTERED IN THE ABOVE-ENTITLED CAUSE ON THURSDAY, THE 12TH DAY OF NOVEMBER, 1992.

WITNESS MY HAND AND THE SEAL OF THE COURT, WEDNESDAY, THE 16TH DAY OF DECEMBER, 1992.

ROBERT F. WANDRUFF,
CLERK

BY M. JAMESON
DEPUTY

APPENDIX D

S006546

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

PEOPLE v. ROBERT PAUL WILSON

In the above-entitled matter the court filed its decision on November 12, 1992, because of the following extraordinary and compelling circumstances:

1. The fact that the record as certified was not filed until September 14, 1990.

2. The fact that briefing was not complete until April 14, 1992.

_____

Chief Justice